93

FILED
MAY 16 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 07-1299

IN THE

Supreme Court of the United States

ALAN D. WEINBERGER, *et al.*,

Petitioners,

v.

STEFAN F. TUCKER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DEBORAH J. JEFFREY*
FRANCIS D. CARTER
ELLEN D. MARCUS
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 778-1800

**Counsel of Record*

May 16, 2008

TABLE OF CONTENTS

TABLE OF APPENDICES ..... *ii*
TABLE OF AUTHORITIES ..... *iii*
INTRODUCTION 1
STATEMENT OF THE CASE 1
REASONS TO DENY THE PETITION 3
CONCLUSION 6

TABLE OF APPENDICES

Appendix A — Excerpts from Petitioners' Brief Filed in the United States Court of Appeals for the Fourth Circuit Dated February 14, 2007 ..... 1a

Appendix B — Excerpts from Respondent's Brief Filed in the United States Court of Appeals for the Fourth Circuit Dated March 19, 2007 ..... 3a

TABLE OF AUTHORITIES

CASES

Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) 1, 3, 4, 5

Q Int'l Courier, Inc. v. Smoak, 441 F.3d 214 (4th Cir. 2006)..... 4, 5

RULES

Sup. Ct. R. 10..... 5

INTRODUCTION

Petitioners Alan D. Weinberger and The ASCII Group, Inc. (collectively, the "Petitioners") misstate the holding of the decision below in order to manufacture a federal issue where none exists. The decision does not conflict with this Court's precedent, nor does it create a conflict among circuits. To the contrary and as required by *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001), the United States Court of Appeals for the Fourth Circuit applied Virginia's doctrine of collateral estoppel and properly dismissed the complaint because a prior action decided by a federal court in Virginia sitting in diversity barred Petitioners from re-litigating issues already determined against them. Because, as set forth further below, the Fourth Circuit's decision does not present the first and second questions that Petitioners would have this Court review, Petitioners failed to preserve their arguments below in support of the third proposed question presented, and the petition is inaccurate, the petition should be denied.

STATEMENT OF THE CASE

By order dated November 9, 2006, the United States District Court for the Eastern District of Virginia dismissed claims of legal malpractice, breach of fiduciary duty and fraud brought by Petitioners against respondent Stefan F. Tucker (the "Respondent") arising from the negotiation and drafting of a loan guarantee executed by Petitioners

and their privies. Pet. App. 22a-23a. The district court held that those claims were barred by Virginia's doctrine of collateral estoppel because a prior action enforcing the guarantee had conclusively determined that Respondent, an attorney, had not represented Petitioners and their privies in connection with the guarantee but had instead represented their adversary, and that Petitioners had waived any conflict of interest associated with the representation. The district court further held that the fraud claims were barred by the prior determination that Respondent had not fraudulently induced Petitioners and their privies to sign the guarantee. The district court applied Virginia's doctrine of collateral estoppel because the court in the earlier action was sitting in diversity in Virginia. Pet. App. 20a-21a (applying elements of Virginia's collateral estoppel doctrine).

Petitioners appealed the district court's decision. On December 20, 2007, the United States Court of Appeals for the Fourth Circuit affirmed the dismissal. Pet. App. 1a-18a. The opinion stated unequivocally that the court was applying Virginia's doctrine of collateral estoppel:

> Weinberger cannot prevail on his claims without directly contradicting the court's findings in *ASCII I* [the prior action]. We hold that Virginia's doctrine of collateral estoppel bars any attempt by Weinberger to repackage

> the claims rejected in the underlying case as claims against Tucker.

Id. at 18a (emphasis added); *see also id.* at 7a-8a (stating that "Virginia collateral estoppel law applies," and listing the four requirements for collateral estoppel in Virginia).

On January 15, 2008, the Fourth Circuit denied Petitioners' petition for rehearing and rehearing en banc. Pet. App. 31a.

REASONS TO DENY THE PETITION

1.a. The first two questions presented proposed in the petition are not in fact presented by the decision below. Petitioners' assertions notwithstanding, the Fourth Circuit unquestionably applied Virginia's doctrine of collateral estoppel to determine the preclusive effect of the earlier diversity action. Indeed, the Fourth Circuit noted the parties' agreement that "Virginia collateral estoppel law applies." Pet. App. 7a; *see also* Brief of Appellants, attached hereto as Appendix A at 1a-2a ("The parties agree that, because the underlying action was a diversity case in federal district court in Virginia, the preclusive effect, if any, of any order or judgment in that case must be determined by Virginia law. *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001)."); Brief of Appellee, attached hereto as Appendix B at 3a-4a ("Virginia's collateral estoppel doctrine governs Mr. Tucker's renewed motion to dismiss because it is

based on the preclusive effect of *ASCII I* — an action in diversity decided by a federal court sitting in Virginia").

b. Not only did the Fourth Circuit unambiguously state in its opinion that it was applying Virginia's collateral estoppel law, it relied throughout the opinion upon the law of Virginia as expressed by its highest court and by federal courts that were themselves applying Virginia law. At the beginning of its analysis, the court lists the four elements of collateral estoppel under Virginia law, citing a decision of the Supreme Court of Virginia. Pet. App. 7a-8a. The remainder of the opinion applies each of those elements to the record and ultimately holds that the elements are satisfied and that Petitioners' claims were properly dismissed as precluded. *Id.* at 8a-18a. The opinion concludes with an unambiguous statement affirming the district court's dismissal because "Virginia's doctrine of collateral estoppel" bars the claims. *Id.* at 18a.

c. That Virginia's collateral estoppel law applied was well settled and required no discussion. The Fourth Circuit was clearly bound by the precedent of this Court that the preclusive effect of a decision by a federal court sitting in diversity is determined by the preclusion rules of the state in which the court sat. *Semtek*, 531 U.S. at 508. Before the instant case reached the Fourth Circuit, that court had already recognized that under *Semtek*, "the preclusive effect, if any, of the first

action on the second action should . . . [be] decided under the res judicata law of the state of Virginia—the law of the state where the federal district court sat [in diversity] in the first action." *Q Int'l Courier, Inc. v. Smoak,* 441 F.3d 214, 218 (4th Cir. 2006) (citing *Semtek*) (holding that Virginia, not federal, *res judicata* law applied to determine preclusive effect of earlier federal diversity action in Virginia).

2. Petitioners' third proposed question presented—whether, as a matter of federal law, the denial of a motion to disqualify counsel is entitled to preclusive effect—was never briefed, argued or decided in this case because the parties and the courts recognized and agreed that Virginia's issue preclusion law governs this action.

3.a. Petitioners' disagreement with the Fourth Circuit's application of Virginia's collateral estoppel doctrine to the facts does not present any issue suitable for this Court's review. *See* Pet. at 7 (objecting that the Fourth Circuit's opinion creates an "irreconcilable conflict on the application of the Virginia rules of issue preclusion between the Fourth Circuit and the Supreme Court of Virginia"); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

b. The Fourth Circuit did not, as Petitioners assert, apply Virginia's issue preclusion rules selectively or omit any of the essential elements of collateral estoppel. Pet. 4. Although

Petitioners contend that the court did not address the identity of issues between the prior action and the instant case (Pet. 4-5), the court clearly explained in Section II(B) of its opinion the particular factual findings in the earlier case that foreclosed issues essential to the claims in this case. Pet. App. 13a-15a. Nor does it matter for purposes of collateral estoppel that this case involves different claims than the earlier case. *See* Pet. at 5 ("The elements of the claims in *ASCII I* [the earlier case] and *ASCII II* [the instant case] are materially different . . ."). Identity of claims is not a requirement of collateral estoppel under Virginia law—it is an element of *res judicata*, also known as claim preclusion.

c. Equally without merit is the petition's vague suggestion that the court improperly relied on federal law. Pet. 4. Instead, the court cited federal decisions regarding the privity requirement only after noting that the test for privity is the same under Fourth Circuit and Virginia decisions, based on a case by case analysis of the relationship and interests of the parties. Pet. App. 9a.

CONCLUSION

Petitioners' complaint lies not with any failure of the Fourth Circuit to adhere to the precedents of this Court, nor with any conflict among circuits on a significant issue, nor with a concern about federalism. The Fourth Circuit's opinion shows on its face that the court applied Virginia's issue

preclusion rules. Petitioners' real contention is that the Fourth Circuit applied them incorrectly. That contention is wrong and, more importantly, it does not present an issue worthy of this Court's attention.

For the foregoing reasons, Respondent Stefan F. Tucker respectfully urges that the petition for a writ of certiorari should be denied.

Respectfully submitted,

DEBORAH J. JEFFREY*
FRANCIS D. CARTER
ELLEN D. MARCUS
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 778-1800

May 16, 2008

**Counsel of Record*

APPENDIX

APPENDIX A — EXCERPTS FROM PETITIONERS' BRIEF FILED IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED FEBRUARY 14, 2007

RECORD NO. 06-2302

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALAN D. WEINBERGER;
THE ASCII GROUP, INCORPORATED,

PLAINTIFFS-APPELLANTS,

v.

STEFAN F. TUCKER,

DEFENDANT-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

BRIEF OF APPELLANTS

[commencing at page 15]

* * *

The parties agree that, because the underlying action was a diversity case in a federal district court

in Virginia, the preclusive effect, if any, of any order or judgment in that case must be determined by Virginia law. *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 491, 508-09 (2001).

* * * *

APPENDIX B — EXCERPTS FROM RESPONDENT'S BRIEF FILED IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED MARCH 19, 2007

RECORD NO. 06-2302

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALAN D. WEINBERGER;
THE ASCII GROUP, INCORPORATED,

PLAINTIFFS-APPELLANTS,

v.

STEFAN F. TUCKER,

DEFENDANT-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

BRIEF OF APPELLEE

[commencing at page 21]

* * *